

GEORGE BENSON AND OTHERS
 vs.
 JOEL WRIGHT AND JOHN MARFIELD. } DECEMBER TERM, 1848.

[CONSTRUCTION OF WILL—PER CAPITA DISTRIBUTION—PRACTICE.]

A TESTATRIX devised a portion of the residue of her estate to certain trustees in trust "for the use of the children of M. S., the children of W. B. and G. B., equally as tenants in common, their heirs and representatives forever."

HELD—

That the children of M. S. and W. B., born *since* the death of the testatrix, are to be excluded from the benefit of this bequest, but all their children born prior to that period, and G. B. take *per capita*, and equally.

The answer of an infant by his guardian is not evidence against him, and the necessity of establishing the case as stated in the pleadings by proof is not obviated by making the infant a plaintiff.

[In this case, the construction of the following clause of the will of Hannah Benson, executed on the 5th of July, 1845, was submitted to the Chancellor. The testatrix had devised all the residue of her estate to the defendants, in trust, as to one-half for the benefit of certain parties, and the will then contains this clause. "And as to the other half of said estate and property in trust for the use of the children of Margaret Swornstedt, the daughter of my late husband, Peter Benson; the children of William Benson, the son of my said late husband, and George Benson, also a son of my said late husband, equally, as tenants in common, their heirs and representatives forever, provided however, that if the said George Benson should depart this life without leaving a child or the descendant of a child living, then for the use and benefit of the children of his sister, Maria Catharine Forney, their heirs and assigns forever."

George Benson, in his own right and as next friend of the infant children of Margaret Swornstedt and William Benson, some of whom were born since the death of the testatrix, filed the bill in this case against the trustees named in the will, asking the instruction of the court as to the distribution of the income of the trust estate, upon which the Chancellor delivered the following opinion.]